already advance pays 70-80 percent of its bills from Verizon.[517] Cavalier contends that this fact undermines Verizon's entire rationale for insisting on an assurance of payment.[518]

162. Although Verizon testified at the hearing that bill disputes are handled pursuant to an orderly process, Cavalier argues that the proposed Agreement is silent as to any such process.[519] In Cavalier's experience, Verizon unilaterally decides whether a dispute is *bona fide* and then unilaterally determines what action it will take.[520] Verizon accuses Cavalier of having a "tendency to litigate rather than pay its bills,"[521] but Cavalier explains that sometimes litigation is the only way that it can get Verizon to take its bill disputes seriously.[522] Cavalier accuses Verizon of "chaotic" billing and claims that Verizon will use "all means available to apply unilateral and unjustified payment pressures on Cavalier even when billing is inaccurate."[523]

163. Finally, although Verizon argues that the potential risk from other competitive LECs warrants the inclusion of section 20.6 in its agreement with Cavalier, Cavalier responds that each carrier is unique and Verizon's arguments about generalized risk are misplaced.[524] Moreover, Cavalier points out, the rights that would be granted to Verizon under section 20.6 are not reciprocal; as drafted, that section provides Cavalier with no protection should Verizon prove unwilling or unable to pay its bills to Cavalier.[525] According to Cavalier's testimony, these charges to Verizon currently amount to several million dollars per year.[526]

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[517] *Id.* at 64; Cavalier Reply Brief at 37 (citing Tr. at 321). Cavalier also argues that proposed § 20.6 runs afoul of the Commission's *Deposit Policy Statement* because it bears the "potential for discrimination" and "may not be as objective as [Verizon] claim[s]." Cavalier Brief at 65 (citing *Deposit Policy Statement*, 17 FCC Rcd at 26894, para. 21).

[518] Cavalier Reply Brief at 37.

[519] *See* Cavalier Brief at 63 (citing Tr. at 313-315).

[520] *Id.* (citing Tr. at 314-15).

[521] *See* Cavalier Reply Brief at 33 (citing Verizon Brief at 56).

[522] *See id.* at 33-35.

[523] *See id.* at 38. Cavalier cites examples of billing disputes with Verizon, including a case it litigated before the United States District Court for the Eastern District of Virginia, and a very recent instance when, in response to Cavalier's request that certain bills be consolidated, Verizon allegedly (1) demanded ASRs; (2) announced it would charge Cavalier for the ASRs; and (3) warned that service disruptions to Cavalier's customers might occur in connection with the bill consolidation. Cavalier files certain court filings from litigation with Verizon in support of its argument that Verizon does not always consider Cavalier's billing disputes to be *bona fide*. *See id.* at 32-35 & n.98, Ex. C21-1-C21-5.

[524] *Id.* at 36.

[525] *Id.* at 36-37.

[526] *See* Cavalier Rebuttal Testimony of Whitt at 8-9.

164. Verizon argues that proposed Section 20.6 is nearly identical to language that the Bureau adopted in the *Virginia Arbitration Order*.[527] Verizon notes that, in that order, the Bureau acknowledged that "Verizon has a legitimate business interest in receiving assurances of payment ... from its competitive LEC customers."[528] To the extent that its proposal varies from the adopted language, Verizon claims that it either clarifies that language[529] or is supported by the Commission's *Deposit Policy Statement*.[530]

165. Verizon contends that, contrary to Cavalier's position, subsections (x) and (y) are consistent with the terms of the Commission's *Deposit Policy Statement*. First, under subsections (x) and (y), Verizon may only bill Cavalier in advance for monthly services if Cavalier misses two payments in a 60-day period or three payments in a 180-day period. Thus, as suggested by the *Deposit Policy Statement*, these subsections contain "'clear and explicit' standards for defining a 'proven history of late payment'" and "'advance billing is triggered only by concrete, objective standards ... narrowly tailored to target only those customers that pose a genuine risk of nonpayment.'"[531] Verizon also argues that these provisions protect Cavalier in conformity with the *Deposit Policy Statement* because they ensure that Verizon cannot invoke the assurance of payment provisions if: (1) bills are the subject of *bona fide* dispute;[532] (2) the

[527] Verizon Brief at 55-56; Verizon Reply Brief at 53 (citing *Virginia Arbitration Order*, 17 FCC Rcd at 27389-90, para. 727).

[528] *See* Verizon Brief at 57-58; Verizon Reply at 53 (quoting *Virginia Arbitration Order*, 17 FCC Rcd at 27389-90, para. 727). Concerning the agreements that resulted from the prior AT&T/Cox/WorldCom arbitration, Verizon states that, contrary to Cavalier's assertion, AT&T was not exempted from the assurance of payment provision and asserts that Cavalier neither asked for the $100 million net worth exemption set forth in the WorldCom agreement, nor contends that it would fall within this exemption. Verizon Reply Brief at 54-55. Verizon also notes that the Bureau added the net worth exemption to the WorldCom agreement "to help 'establish Verizon's right to request assurances of payment from smaller or less-stable competitive LECs that may opt into the agreement.'" Verizon Reply Brief at 55 (quoting *Virginia Arbitration Order*, 17 FCC Rcd at 27390, para. 972 [sic 728]). Moreover, the Bureau rejected WorldCom's request that the assurance of payment provision be omitted. Verizon Reply Brief at 55 (citing *Virginia Arbitration Order*, 17 FCC Rcd at 27389-90, paras. 726-27).

[529] Verizon explains that § 20.6 clarifies the language adopted in the prior Virginia Arbitration by specifying the circumstances under which it can exercise its right to request assurance of payment, and when it can draw upon the proposed letter of credit. *See* Verizon Brief at 56-57 (citing Verizon Rebuttal Testimony of Smith at 12; Tr. at 310). Verizon explains that its proposed language permits it to request a letter of credit from Cavalier equal to two months' anticipated charges, but only permits it to draw upon that letter to satisfy bills that are more than 30 days in arrears. Verizon Brief at 56-57 (citing Verizon Rebuttal Testimony of Smith at 12; Final Proposed Language at 33-35 (Verizon Proposed § 20.6)).

[530] Verizon argues that that subsections (x) and (y) to § 20.6 "were intended to be consistent with" the Commission's Policy Statement insofar as they track certain Commission recommendations as to how carriers might guard against the risk of nonpayment by connecting carriers. *See* Verizon Brief at 58-59 (citing *Deposit Policy Statement*, 17 FCC Rcd at 26887-88, para. 6).

[531] Verizon Reply Brief at 55-56 (quoting *Deposit Policy Statement*, 17 FCC Rcd at 26896, 26897, paras. 27, 29); *see* Verizon Brief at 58-59.

[532] Verizon Brief at 58; Verizon Reply Brief at 56. Although Cavalier claims that, under subsections (x) and (y) of § 20.6, if it "disputed more than 5% of Verizon charges on any two bills in 60 days, or three bills in 180 days, then (continued....)

undisputed amount due is less than five percent of the total amount billed in the relevant period;[533] or (3) Cavalier has not received the bill.[534] Verizon also claims to treat every dispute as *bona fide* and argues that Cavalier may escalate, if Verizon determines that a dispute is not *bona fide*, under section 28.9 of the Agreement.[535] Indeed, Verizon points out that section 28.9, which is not in dispute, sets forth, in precise detail, the procedures governing *bona fide* disputes.[536] Verizon also challenges Cavalier's contention that Cavalier's deposit and prepayment liabilities could total $7.5 million, if the "additional assurance of payment" provisions of subsections (x) and (y) were triggered.[537]

166. Verizon argues that Cavalier's position, which would eliminate the approved language, would subject Verizon to undue risk of nonpayment in two ways. First, due to the volatility in the industry, which has already resulted in the bankruptcy of 144 carriers, Cavalier might suddenly declare bankruptcy and thus Verizon would risk nonpayment for services already provided.[538] Second, because Cavalier has a "tendency to litigate rather than pay its bills" the risk of nonpayment is particularly high in this case.[539] Verizon argues that this risk should be placed with Cavalier and its investors, not Verizon.[540] Finally, Verizon argues that, even if Cavalier is financially stable and assurance of payment provisions are not necessary in its case, under section

(Continued from previous page)
Verizon could demand an additional $2.5 million" advance payment, Verizon says that is incorrect. Because § 20.6 explicitly excludes amounts subject to *bona fide* dispute and forbids Verizon from using any amounts subject to *bona fide* dispute to invoke the assurance of payment provisions, Verizon claims that disputed amounts would not be subject to subsections (x) and (y). *See* Verizon Reply Brief at 53 (quoting Cavalier Brief at 62), 54 (citing Verizon Rebuttal Testimony of Smith at 12; Tr. at 310).

[533] Verizon argues that this policy responds to the concern expressed in the *Deposit Policy Statement* that *de minimis* past due amounts not trigger assurance of payment provisions. Verizon Reply Brief at 56 (citing *Deposit Policy Statement*, 17 FCC Rcd at 26896, 26897, paras. 27, 29).

[534] Verizon notes that, because bills are not payable unless they are received, Cavalier's alleged concern is unfounded that Verizon will invoke the assurance of payment provision if Verizon furnishes a bill late or Cavalier does not receive a bill. *See* Verizon Reply Brief at 55 (citing Cavalier Brief at 62; Tr. at 311-12). Verizon argues this policy is consistent with the Commission's *Deposit Policy Statement*. *Id.* at 55 (citing *Deposit Policy Statement*, 17 FCC Rcd at 26897, para. 29).

[535] *See id.* at 53 (citing Tr. at 313-14).

[536] *Id.* at 54 (citing Verizon Response, Ex. C at § 28.9).

[537] *Id.* at 56-57.

[538] *See* Verizon Brief at 56-57 (citing Tr. at 316; Verizon Rebuttal Testimony of Smith at 14); *see also id.* at Ex. 6 (list of competitive LEC bankruptcy filings between July 1, 1996 and September 19, 2003).

[539] *See* Verizon Brief at 56 (citing Verizon Direct Testimony of Smith at 25; Tr. at 313).

[540] *See id.* at 57 (citing Verizon Rebuttal Testimony of Smith at 14).

252(i),[541] other carriers could opt into Cavalier's agreement in Virginia. Should such other carriers became insolvent, Verizon would be left without a payment recovery mechanism.[542]

c. Discussion

167. We adopt a portion of Verizon's proposed language with modifications.[543] As we recognized in the *Virginia Arbitration Order*, Verizon has a legitimate business interest in receiving assurances of payment, where warranted, from its competitive LEC customers, including carriers that may opt into Cavalier's interconnection agreement.[544] Nevertheless, a significant part of Verizon's proposed language is not consistent with the Commission's *Deposit Policy Statement*, which was issued by the Commission subsequent to the release of the Bureau's *Virginia Arbitration Order*.[545] To the extent that Verizon is at risk of nonpayment by its competitive LEC customers and protection may be warranted, the *Deposit Policy Statement* sets forth lawful parameters and we apply them here.[546]

168. First, we reject the portions of Verizon's proposed section 20.6 that would permit Verizon to demand "adequate assurance of payment" from Cavalier in the form of a cash deposit or letter of credit equal to two months' charges for services rendered under the Agreement by Verizon to Cavalier.[547] As Cavalier argues, Verizon's language is highly subjective.[548] Lacking

[541] 47 U.S.C. § 252(i).

[542] *See* Verizon Brief at 59.

[543] We note separately that Cavalier complains that, although it charges Verizon several million dollars per year, rights granted to Verizon under § 20.6 are not reciprocal. *See* Cavalier Rebuttal Testimony of Whitt at 8-9. These Cavalier-Verizon charges, however, are access charges and are not the subject of the interconnection Agreement. *See id.* Thus, they are for services provided by Cavalier to Verizon pursuant to Cavalier's FCC exchange access tariffs. *See* Aug. 1 Draft Agreement at Ex. A, Part II (interstate exchange access services provided by Cavalier to be priced in accordance with Cavalier's FCC exchange access tariff).

[544] *Virginia Arbitration Order*, 17 FCC Rcd at 27389-90, para. 727.

[545] We also note that Verizon has sought reconsideration of the Bureau's resolution of the "Assurance of Payment" issue as it related to WorldCom in the *Virginia Arbitration Order*. *See* Verizon's Petition for Clarification and Reconsideration of July 17, 2002 Memorandum Opinion and Order at 38, Docket Nos. 00-218, *et al.* (filed Aug. 16, 2002). As Cavalier suggests, AT&T did not challenge Verizon's proposed Assurance of Payment provision in that arbitration. *See* Cavalier Brief at 62.

[546] Although the *Deposit Policy Statement* concerned proposed deposit provisions for interstate services and therefore applied standards set forth in §§ 201-202 of the Act, we believe that its guidance pertains to deposit or advance payment provisions incumbent LECs might seek to impose on competitors under §§ 251-252 of the Act. We note that neither Party has argued that the *Deposit Policy Statement* is inapplicable here.

[547] *See* Final Proposed Language at 33-35 (Verizon Proposed § 20.6).

[548] *See* Cavalier Reply Brief at 32. For example, under this provision, Verizon may determine, subject only to its "reasonable judgment," whether Cavalier is "creditworthy." As Cavalier argues, rather than requiring Verizon to apply an objectively determined measure of financial stability, this language vests Verizon with broad discretion to decide when a deposit is necessary. *See id.*

any specific criteria, it is, moreover, unacceptably susceptible to discriminatory application.[549] This is the sort of vague language about which the Commission expressed misgivings in the *Deposit Policy Statement*.[550] Although we agree that some protection is appropriate from a customer with a proven history of late payment, that concern is sufficiently addressed under our revisions to subsections (x) and (y).

169. Second, we adopt a modified version of Verizon's proposed subsections (x) and (y). In the *Deposit Policy Statement*, the Commission noted that, that under existing interstate access tariffs, carriers may seek deposits of up to two months of access billing from customers with a proven history of late payment.[551] Accordingly, the Commission recommended that carriers address the risk of nonpayment by defining a proven history of late payment trigger for requiring such a deposit. Separately, the Commission recommended that carriers "[b]ill in advance for usage-based services currently billed in arrears, based on average usage over a sample period, perhaps phasing in the first advance bill over a period of several months."[552] Verizon's proposed language in subsections (x) and (y) seeks neither a deposit requirement nor to *bill* Cavalier in advance for services currently billed in arrears. In fact, as Cavalier points out, Verizon already bills in advance for approximately 70-80 percent of the services it provides to Cavalier.[553] Rather, proposed subsections (x) and (y) would allow Verizon to demand assurance of payment consisting of monthly advanced *payments* of estimated charges.[554] Although in their briefs the Parties assert that Cavalier already pays 70-80 percent of its bills from Verizon in advance,[555] we believe that is a mischaracterization. At the hearing, Cavalier's witness for this issue testified that Verizon currently *bills* Cavalier in advance for services.[556] If there is a proven history of late payment by Cavalier, it is consistent with the *Deposit Policy Statement* to permit Verizon to require one month's advance payment from Cavalier for a discrete period.[557]

[549] *See Deposit Policy Statement*, 17 FCC Rcd at 26894, para. 21, *cited in* Cavalier Brief at 65. Similarly, Verizon's proposed language that would permit it to demand a deposit or letter of credit, should Cavalier admit that it is unable to pay its debts when due, or become the subject of a bankruptcy or similar proceeding, is also susceptible to discriminatory application. *See Deposit Policy Statement*, 17 FCC Rcd at 26890, 26894, paras. 11, 21-22.

[550] *See Deposit Policy Statement*, 17 FCC Rcd at 26894, para. 21.

[551] *See id.* at 17 FCC Rcd at 26888-89, 26890, paras. 7, 12.

[552] *Id.* at 17 FCC Rcd at 26896, para. 26.

[553] Tr. at 321; *see also* Cavalier Direct Testimony of Whitt at 12.

[554] "Advance *billing* means, for example, that a bill is generated on January 1, due February 1, for services provided in January." Advance *payment*, which Verizon seeks under subsections (x) and (y) "means, for example, that a bill would be generated on December 1, due January 1, for services provided in January." *Deposit Policy Statement*, 17 FCC Rcd at 26888 n.26 (emphasis added).

[555] *See* Cavalier Brief at 64; Verizon Reply Brief at 56.

[556] Tr. at 321.

[557] *See Deposit Policy Statement*, 18 FCC Rcd at 26896, para. 26.

170. As noted, the Commission recommended in the *Deposit Policy Statement* that, to demonstrate entitlement to a customer deposit, carriers should, in their tariffs, define a trigger for a "'proven history of late payment' ... to include a failure to pay the undisputed amount of a monthly bill in any two of the most recent twelve months."[558] Verizon proposes language that would define a proven history of late payment as Cavalier's failure to "pay (x) two (2) or more bills (in respect of amounts not subject to a *bona fide* dispute) that Verizon renders at any time during any sixty (60) day period or (y) three (3) or more bills (in respect of amounts not subject to a *bona fide* dispute) that Verizon renders at any time during any one hundred eighty (180) day period."[559] We are concerned that, because of the large number of bills Verizon renders to Cavalier every month, the proposed language could be misinterpreted to require advance payment in circumstances not contemplated by the *Deposit Policy Statement.* Cavalier testified that Verizon renders 200-300 bills to it every month.[560] Verizon's proposed language could trigger the advance payment requirement if Cavalier failed to timely pay two individual bills within a 30-day period, as long as the total of those two individual bills exceed the *de minimis* amount. Accordingly, we revise Verizon's proposed language to define the proven history of late payment trigger as nonpayment of the total amount due (and not subject to *bona fide* dispute) under bills rendered by Verizon in either (x) two consecutive thirty-day periods; or (y) three 30-day periods within a 180-day period, when the amounts past due exceed the *de minimis* amount.

171. In the *Deposit Policy Statement*, the Commission also directed carriers to ensure that the proven history of late payment provision is not triggered unless "both the past due period and the amount of the delinquent payment are more than *de minimis*."[561] Under its proposed language, Verizon would not be entitled to request advance payment when the undisputed unpaid amount "represents less than five percent (5%) of the total amount of Verizon's bills rendered to Cavalier."[562] This addresses only the past due amount and not the past due period. With respect to the former, although Verizon defines a "*de minimis*" amount as less than five percent of the total undisputed amount due, we set the *de minimis* percentage to be ten percent or less of the total amount due because we are concerned about evidence that there have been problems in the past with Verizon's billing, including nonreceipt of bills, software problems, and apparent billing

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558 *Id.*

559 Final Proposed Language at 34 (Verizon Proposed § 20.6).

560 *See* Tr. at 311-12.

561 *See Deposit Policy Statement*, 17 FCC Rcd at 26896, para. 26.

562 Final Proposed Language at 34 (Verizon Proposed § 20.6). As Verizon argues, § 28.9 of the Parties' proposed agreement, which is undisputed, specifies at some length the procedures concerning the handling of billing disputes. *See* Verizon Reply at 54; *see also* Aug. 1 Draft Agreement § 28.9. Although Cavalier complains that there is no orderly process for handling billing disputes, proposed § 28.9, to which it has not objected, belies that assertion. We are concerned, however, that § 28.9.1 requires the "billed Party" to "establish that the bill was not timely received." This seems counter-intuitive in the case where the bill has not been received at all, which apparently has happened in the past. *See* Tr. at 310-12. We address this concern in our treatment of the *de minimis* amount.

inaccuracies.[563] We note that, pursuant to sections 28.9.3 and 28.9.3.1 of the Agreement, under certain circumstances, amounts subject to *bona fide* dispute are to be deposited with a third-party escrow agent.[564] Accordingly, Cavalier may also be required to set aside amounts it disputes, which provides Verizon with additional protection.

172. Finally, we are concerned that proposed section 20.6 does not specify any procedure pursuant to which Verizon may invoke its protections. It also does not specify a *de minimis* past-due period, as recommended by the *Deposit Policy Statement*. Given the Parties' past history of billing disputes, we believe additional language is required. Accordingly, we require Verizon to provide Cavalier with ten days' written notice of its intent to invoke its right to advance payment for specific past due amounts. We permit Cavalier an additional ten days from receipt of Verizon's notice to dispute any amounts Verizon contends are past due and also to identify specific amounts as the subject of a *bona fide* dispute. In that case, these disputed amounts will be subject to the *bona fide* dispute provisions set forth in section 28.9, rather than the past due provisions set forth in section 20.6. We believe these additional protections also address the concern identified in the *Deposit Policy Statement* that amounts that are only a few days past due should not be considered in invoking an advance payment or deposit obligation.[565]

d. Arbitrator's Adopted Contract Language

173. The Arbitrator adopts the following language for section 20.6:

> If Cavalier fails to timely pay more than ten percent (10%) of the total amount due (and not subject to *bona fide* dispute under section 28.9) under bills rendered by Verizon in either (x) two consecutive thirty-day periods; or (y) three thirty-day periods within a 180-day period, Verizon may invoke the protections of this

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[563] *See* Tr. at 310-11, 312, 315-16; *cf. supra* n.562. It is unclear whether, under the prior agreement, the disputed amounts were considered exempt under a *bona fide* dispute provision. We note that Cavalier testified that past billing disputes between the Parties resulted in multimillion dollar credits for Cavalier. Tr. at 316. In light of all of the evidence, we also reject Verizon's argument that, because Cavalier has a "tendency to litigate rather than pay its bills," the risk of nonpayment by Cavalier is particularly high. Verizon Brief at 56. We also note that, although Verizon worries that Cavalier might suddenly declare bankruptcy (*see* Verizon Brief at 57), no evidence was presented that Cavalier is near bankruptcy; in fact, Verizon's witness testified that Cavalier currently is paying its bills on time. *See* Tr. at 316, 318. We note that the Commission has previously found in another context that ten percent may constitute a *de minimis* amount. *See MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 78-72, Decision and Order, 4 FCC Rcd 5660 at paras. 2, 4 (1989) (interstate traffic deemed to be *de minimis* when it amounts to ten percent or less of the total traffic on a special access line).

[564] These circumstances include when Cavalier has a proven history of late payments. *See* Aug. 1 Draft Agreement §§ 28.9.3, 28.9.3.1.

[565] The last sentence of Verizon's proposed § 20.6 provides that, by demanding a deposit, letter of credit or other security, Verizon does not waive other rights it may have under the Agreement to be paid for its services or to discontinue service for nonpayment. We reject this language. To the extent that it addresses deposits and letters of credit, it concerns provisions we reject above. Further, we do not believe that § 20.6 as adopted could be read to preclude Verizon from exercising its other rights under the Agreement.

section. If there is such a failure to timely pay by Cavalier, Verizon may demand advance monthly payment of Cavalier's charges. The advance payment that Verizon may demand shall be 1/6 of Cavalier's actual undisputed billed usage during the six-month period preceding the last delinquency. Verizon shall true-up Cavalier's advance payments against actual billed charges once per calendar quarter. Verizon's right to advance payment under this section 20.6 will terminate one year from Cavalier's last delinquent payment. In order to invoke this advance pay provision, Verizon must provide Cavalier with ten days' written notice, in which it must identify specific bills and corresponding amounts that it contends have neither been timely paid nor are the subject of a *bona fide* dispute. Cavalier shall respond in writing within ten days of receipt of such notice. In the event that Cavalier asserts that specific unpaid amounts are the subject of a *bona fide* dispute, these amounts shall be subject to section 28.9 and shall not be considered past due under this section 20.6. Notice under this section shall be provided in accordance with section 28.12.

12. Issue C24 (Notice of Termination of Services for Non-Payment)

a. Introduction

174. The Parties disagree about the requirements that should apply before one Party can give the other Party a notic[illegible] a termination of service in the event of non-payment under the contract.[566] Pursuant to ru[illegible] tablished by the Virginia Commission, when one carrier intends to terminate the servic[illegible] another carrier it must first provide that carrier 60-days notice.[567] Once that notice i[illegible]rovided, the Virginia Commission typically requires the carrier receiving such notice to pro[illegible] at least a 30-day notice to its respective customers that their service may be in jeopardy [illegible]valier proposes language that would require a Party prepa[illegible]g to send a 60-day notice for non-payment to first obtain the permission of the Virginia Co[illegible]ion (after that commission had considered the validity of the billing dispute) prior to sendin[illegible] termination notice.[568]

b. Positions of the Parties

175. As a protection against having to notify each of its customers of a service discontinuance as a result of Verizon's determination that an invoice dispute is not *bona fide*, Cavalier proposes that each Party must undertake the additional step of obtaining state approval

[566] The Parties also use the term "embargo" when referring to a termination of existing service or a refusal to provide new services. We will refer to both of these actions as a "termination of service."

[567] *See* 20 VA. Admin. Code § 5-423-80. This provision also requires notice to the Virginia Commission at the same time.

[568] The 60-day notice would also apply in the case of a material breach or default under the contract, however the Parties limit their discussions to cases relating to failure to pay amounts due under the contract.

prior to initiating the 60-day notice procedure.[569] According to Cavalier, Verizon's proposal gives Verizon the unilateral right to force Cavalier to give notice to its customers that it may exit the market, regardless of whether that is Cavalier's intention.[570] Cavalier asserts that its proposed language is a minor shift to prevent a drastic situation whereby Verizon could use a payment dispute to drive Cavalier out of business. Finally, Cavalier claims its proposal is not intended to require a formal evidentiary hearing before a termination notice is permitted to be sent.[571]

176. Verizon claims that its contract language reflects notification requirements for the termination of service imposed on carriers under Virginia law.[572] Verizon argues that Cavalier's proposed language goes well beyond such requirements, by requiring Verizon to obtain additional regulatory approval prior to complying with the Virginia Commission's current notice requirements.[573] Verizon insists that if Cavalier objects to the notification rules as overly burdensome, it should seek to amend those rules in the appropriate state commission forum.[574] Verizon also claims that Cavalier's proposal would encourage Cavalier not to pay its bills as Verizon would have to continue providing service during the pendency of the regulatory proceeding to determine if notice could be given.[575]

c. Discussion

177. We reject Cavalier's proposed language and adopt Verizon's language in its entirety. As an initial matter, the Bureau addressed the very same language Verizon is proposing here in the *Virginia Arbitration Order*, concluding that the language adequately balances the interests of both parties.[576] We find that the additional regulatory approval proposed by Cavalier would impose an unreasonable and unnecessary burden on Verizon when it legitimately attempts to minimize further monetary losses by giving appropriate notice and opportunity to cure in the

[569] Cavalier Direct Testimony of Whitt at 13-14; Cavalier Brief at 65-66. Cavalier refers to a prior billing dispute with Verizon where Verizon provided the 60-day notice to Cavalier; the Virginia Commission required Cavalier to provide notice to each of its customers; and Cavalier ended up with a significantly smaller customer base as a result of its customers' uncertainty.

[570] Cavalier Arbitration Petition at 23.

[571] Cavalier Direct Testimony of Whitt at 13-14.

[572] Verizon Testimony of Smith at 23; *see also* Verizon Answer/Response at Ex. A; Verizon Brief at 60.

[573] Verizon Brief at 60.

[574] Verizon contends that the notice requirement is imposed upon Cavalier by Virginia law, not any provision of Verizon's proposed language. Verizon Direct Testimony of Smith; Verizon Brief at 61-62.

[575] Verizon Direct Testimony of Smith at 25-26; Verizon Rebuttal Testimony of Smith at 16-17; Tr. at 313; Verizon Brief at 61. Verizon maintains that Cavalier already may initiate a proceeding to attempt to prevent any service termination it believes is unwarranted. Verizon Direct Testimony of Smith at 23-24; Verizon Brief at 64.

[576] *See Virginia Arbitration Order*, 17 FCC Rcd at 27392, para. 732.

event of non-payment.[577] Other provisions of the Agreement provide Cavalier a detailed process for disputing billed charges it deems improperly imposed.[578] When this process is followed, these *bona fide* disputes are not subject to termination notifications until resolved through the dispute resolution process also provided in the Agreement.[579] In such a case, the Parties will have had several months of dispute resolution in which Cavalier will have had an opportunity to present its case prior to the issuance of a termination notice. On the other hand, charges that are not disputed and remain unpaid may justify termination of service, and the language proposed by Verizon provides a sufficient notice period and an opportunity to cure.[580]

178. In light of the procedural safeguards and dispute resolution processes that are available prior to terminating service after notice, the additional protection that Cavalier seeks to impose is unwarranted.[581] While, in theory, a notice of termination could be used for anticompetitive purposes, we find that other provisions of the interconnection agreement with which Verizon is obligated to comply serve to prevent an abuse of the process for sending a termination of service notice for non-payment.[582] Should Cavalier believe that Verizon is sending a termination notice for a purpose other than collecting legitimate past due billings, Cavalier may always petition the Virginia Commission for relief.[583] Finally, to the extent Cavalier believes the Virginia Commission's customer notification requirements create an undue competitive burden, those issues are more appropriately addressed in the context of the Virginia Commission's proceeding adopting those notification requirements.

d. Arbitrator's Adopted Contract Language

179. Based on the conclusions above, the Arbitrator adopts the following language.

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[577] The current 60-day notice process allows a 30 day opportunity to cure before Cavalier would be required to notify its customers. Unpaid charges that were previously *bona fide* disputes but have been settled in Verizon's favor would also appropriately be cause for embargo or termination of service.

[578] Aug. 1 Draft Agreement § 28.9.

[579] *Id*

[580] *See Virginia Arbitration Order,* 17 FCC Rcd at 27392, para. 732 (granting Verizon's request to terminate service when a competitive LEC withholds payment for service without a *bona fide* reason). The current 60-day notice process allows a 30-day opportunity to cure before Cavalier would be required to notify its customers. Unpaid charges that were previously *bona fide* disputes but have been settled in Verizon's favor would also appropriately be cause for embargo or termination of service.

[581] These dispute resolution procedures are set forth in § 28.9 of the Agreement. *See* Aug. 1 Draft Agreement § 28.9.

[582] Aug. 1 Draft Agreement § 28.9

[583] Verizon points out that according to Cavalier's own testimony, such a petition was successful in Delaware. *See* Verizon Rebuttal Testimony of Smith at 16; Cavalier Direct Testimony of Whitt at 14-15.

22.4 – If either Party defaults in the payment of any amount due hereunder, except for amounts subject to a *bona fide* dispute pursuant to Section 28.9 hereof with respect to which the disputing Party has complied with the requirements of Section 28.9 in its entirety or if either Party materially violates any other material provision of this Agreement, and such default or violation shall continue for sixty (60) days after written notice thereof, the other Party may terminate this Agreement or suspend the provision of any or all services hereunder by providing written notice to the defaulting Party. At least twenty-five (25) days prior to the effective date of such termination or suspension, the other Party must provide the defaulting Party and the appropriate federal and/or state regulatory bodies with written notice of its intention to terminate the Agreement or suspend service if the default is not cured. Notice shall be posted by overnight mail, return receipt requested. If the defaulting Party cures the default or violation within the sixty (60) day period, the other Party shall not terminate the Agreement or suspend service provided hereunder but shall be entitled to recover all reasonable costs, if any, incurred by it in connection with the default or violation, including, without limitation, costs incurred to prepare for the termination of the Agreement or the suspension of service provided hereunder.

13. Issue C25 (Limitations of Liability)

a. Introduction

180. The Parties disagree about the appropriate exclusions to the general limitation of liability provisions contained in the agreement. Cavalier proposes to add an additional exclusion that would entitle it to relief where Verizon violates any law governing communications.[584] Verizon asserts that including this provision is commercially unreasonable and would effectively nullify the limitations on liability to which Cavalier has already agreed.[585]

b. Positions of the Parties

181. Cavalier argues that its rights to damages under the Act and related state and federal rules and regulations should not be eliminated at Verizon's insistence.[586] Cavalier claims that eliminating these rights through the limitation of liability provisions contained in section 25 of the agreement would diminish Verizon's incentive to perform its obligations under the agreement.[587] Cavalier acknowledges the existence of the Virginia Commission's Performance Assurance Plan (PAP), but claims it is too complex and subject to interpretation to provide full

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[584] Cavalier Brief at 67.

[585] Verizon Brief at 65.

[586] Cavalier Arbitration Petition at 23; Cavalier Brief at 67; Cavalier Reply Brief at 43.

[587] Cavalier Brief at 68; Cavalier Reply Brief at 42.

monetary damages.[588] Cavalier asserts that the PAP provides no compensation for serious legal violations.[589]

182. Verizon argues that Cavalier's proposal effectively guts the limitation of liability provision of the agreement by adding an exclusion that is so broad as to virtually eliminate any limiting effect.[590] Verizon asserts that the Bureau previously rejected a similar request from WorldCom in the *Virginia Arbitration Order*.[591] According to Verizon, such a provision would give Cavalier recourse any time Verizon failed to provide perfect service to Cavalier.[592] Verizon contends that the Act only requires it to provide service to Cavalier at parity with its own customers, not perfect service,[593] and the PAP adequately addresses Cavalier's concerns.[594] Verizon points out that Cavalier's proposed language is also inconsistent with provisions in all six of Verizon's Virginia tariffs, as well as its tariff on file at the Commission.[595] Finally, Verizon states that it has agreed to three additional exclusions to address Cavalier's concerns that the PAP does not redress serious violations of law.[596]

c. Discussion

183. We reject Cavalier's proposed section 25.5.10 language. We agree with Verizon that this language is commercially unreasonable and would eviscerate any limitations on liability Cavalier agrees to elsewhere in the agreement. While Cavalier claims it is a limited exception to the general limitations on liability, we find that the breadth of the language could conceivably entitle Cavalier to seek redress under virtually any law or regulation that could arguably be related to telecommunications service. Moreover, the Commission previously found that the Virginia Commission's PAP is an appropriate means for ensuring performance and providing

[588] Cavalier Brief at 68; Cavalier Reply Brief at 42; *see also* Cavalier Rebuttal Testimony of Whitt at 11. Cavalier claims this is especially true given that the Virginia Commission recently tilted any Verizon payments under that plan strongly away from UNE-L providers and towards UNE-providers. Cavalier Direct Testimony of Whitt at 15.

[589] Cavalier Rebuttal Testimony of Whitt at 11.

[590] Verizon Brief at 65; Verizon Reply Brief at 60.

[591] Verizon Brief at 65.

[592] *Id.* at 66-67.

[593] Verizon Direct Testimony of Romano at 4.

[594] Verizon Rebuttal Testimony of Agro at 1-3; Verizon Brief at 65-66; Verizon Reply Brief at 60-61.

[595] Verizon Direct Testimony of Romano at 2-4; Verizon Brief at 65; Verizon Reply Brief at 61-62. Cavalier's language would allow Cavalier to hold Verizon financially responsible including, without limitation, for lost profits and/or consequential damages.

[596] Verizon Rebuttal Testimony of Romano at 2. Verizon has agreed to exclude defamation, misleading or inaccurate advertising, and violation of the antitrust laws from the limitations on liability.

financial remedies related to Verizon's obligations under the Act.[597] Finally, Verizon's willingness to include the additional exclusions identified in the contract language we adopt below, as well as the additional exclusion we discussed in Issue C17 above, significantly mitigates any concerns Cavalier may have that Verizon could engage in harmful conduct for which Cavalier is unable to seek redress.[598]

d. Arbitrator's Adopted Contract Language

184. The Arbitrator adopts the following language:

25.5.1 under Sections 18.2, Customer Contact, Coordinated Repair Calls and Misdirected Inquiries; 24, Indemnification; or 28.7, Taxes.

25.5.7 for a claim of defamation;

25.5.8 for a claim of misleading or inaccurate advertising; or

25.5.9 for a claim of violation of antitrust laws (including a claim for trebled or multiple damages under such antitrust laws).

14. Issue C27 (Cavalier Charges for Truck Rolls and Winback-Related Functions)

a. Introduction

185. Cavalier proposes certain language in the pricing schedule that would permit it to charge Verizon for technician dispatches, or "truck rolls," that are required when Verizon claims to have activated a new loop to a Cavalier customer but, in fact, delivers an inactive line.[599] Separately, Cavalier proposes to charge Verizon for activities that it must perform when a Cavalier customer, who is served over loops provided to Cavalier by Verizon, switches to Verizon, which Cavalier terms a "winback."[600] Cavalier proposes to set the charges for these activities at whatever Verizon charges it for similar services. Verizon opposes these Cavalier charges.[601]

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[597] *Verizon Virginia Section 271 Order,* 17 FCC Rcd at 21980-90, para. 198; *see also Virginia Arbitration Order,* 17 FCC Rcd at 27048-49, paras. 17-18; Verizon Rebuttal Testimony of Agro at 3.

[598] *See supra* para. 158 (resolving Issue C17 in part by permitting either Party to seek relief in any forum of competent jurisdiction for alleged inappropriate professional conduct by the other Party under § 18.2 of the agreement). We include a modification to § 25.5.1 to expressly reference the exclusion we adopt to resolve Issue C17. We note that the specific exclusions enumerated in § 25.5 are in addition to any other express exclusions that may appear elsewhere in the agreement.

[599] Final Proposed Language at 37 (Cavalier Proposed Ex. A(2), Part IV).

[600] *Id.* at 36-37.

[601] Verizon Reply Brief at 62.

b. **Jurisdiction**

(i) **Positions of the Parties**

186. Cavalier argues that this Commission has jurisdiction to require Verizon to reimburse Cavalier for certain functions it performs. In response to Verizon's argument, described at greater length below, that, in the *Virginia Arbitration Order*, the Bureau found that the Commission lacks jurisdiction over competitive LEC charges, Cavalier asserts that the *Virginia Arbitration Order* does not support Verizon's claim. Instead, Cavalier argues, the Bureau declined in that order to impose price caps on competitive LEC rates, and determined that challenges by Verizon to the justness and reasonableness of such rates should be brought to the Virginia Commission.[602] Cavalier argues that, since it bases its proposed winback and truck roll rates on Verizon's own charges in Virginia, Verizon would be hard-pressed to demonstrate that Cavalier's charges are unjust or unreasonable.[603] Cavalier also notes that although it did attempt to file its proposed charges in a tariff, the Virginia Commission, in a letter described below, rejected its filing and told Cavalier that such charges belonged in its interconnection agreement.[604]

187. Verizon claims that the Bureau acknowledged in the *Virginia Arbitration Order* that it lacks jurisdiction over intrastate rates charged by competitive LECs to incumbents.[605] In that order, the Bureau found:

> [T]he Bureau, acting as the Virginia Commission for purposes of this proceeding, is authorized by section 252 to determine just and reasonable rates to be charged by Verizon, not petitioners. As Cox points out, the Commission has ruled that it would be *inconsistent with the Act* for a state commission to impose section 251(c) obligations on competitive LECs.[606]

[602] Cavalier Reply Brief at 43-44 (citing *Virginia Arbitration Order*, 17 FCC Rcd at 27324-25, paras. 588-89). Cavalier also cites to §§ 20.2 and 20.5 of the Parties' Agreement as support for its argument that interconnection agreements may contain competitive LEC rates. Cavalier Reply Brief at 43 n.135. These sections govern the procedures for changes and challenges to the rates of both Parties. *See* Cavalier Arbitration Petition, Ex. B at §§ 20.2, 20.5.

[603] Cavalier Reply Brief at 45.

[604] Cavalier Brief at 78 (citing Cavalier Direct Testimony of Clift at 20 & Ex. MC-11; Tr. at 619-20). Cavalier also argues that Verizon should be estopped from challenging the Bureau's jurisdiction to arbitrate this issue because the Parties previously agreed to arbitrate the issues of truck rolls and winbacks. *See id.* at 78-79.

[605] Verizon Brief at 68-69 (citing *Virginia Arbitration Order*, 17 FCC Rcd at 27324-25, paras. 588-89); Verizon Reply Brief at 62. Verizon also disputes as "demonstrably wrong" Cavalier's contention that Verizon consented to jurisdiction and thus should be estopped from raising jurisdictional defenses. Verizon Reply Brief at 64. Verizon cites to its Answer/Response, Direct and Rebuttal Testimony and to its Brief in which it raised this defense. Verizon Reply Brief at 64. It further argues that Cavalier's waiver and estoppel theories are without legal merit. *See id.* at 65 & nn. 7-9 (citations omitted).

[606] Verizon Reply Brief at 64 (quoting *Virginia Arbitration Order*, 17 FCC Rcd at 27324-25, para. 588).

188. Verizon argues that this jurisdictional ruling cannot be trumped by a Virginia Commission letter, which Cavalier offered into evidence, that rejected Cavalier's proposed tariff and directed Cavalier to seek compensation for the services at issue through an interconnection agreement.[607] Verizon disputes Cavalier's claim that if the Bureau does not permit these charges, Cavalier is without a forum to present its proposed charges for review. Instead, Verizon argues, the letter indicates on its face that Cavalier's underlying tariff filing was too vague for the Commission to understand.[608] Verizon also notes that, although the Parties have agreed to certain Cavalier charges in their Agreement, these are reciprocal compensation rates, which the Commission's rules prescribe, rates upon which the Parties have agreed, or rates for which the Virginia Commission has approved a tariff.[609]

(ii) Discussion

189. Verizon argues that, in the *Virginia Arbitration Order*, the Bureau found that the Commission lacked jurisdiction over competitive LEC charges. We disagree and assert jurisdiction to decide this issue. In the *Virginia Arbitration Order*, the Bureau declined to make a determination of a just and reasonable competitive LEC rate under Virginia law, and instead noted that, in that proceeding, it applied federal law.[610] We have jurisdiction to do the same here. To the extent that Cavalier has demonstrated that it performs tasks comparable to those performed by Verizon, it would violate section 251(c)(2)(D) to allow Verizon to assess a charge on Cavalier but disallow a comparable charge by Cavalier on Verizon.[611]

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607 *Id.*; *see* Cavalier Direct Testimony of Clift at Ex. MC-11.

608 *Id.* at 63 (citing Cavalier Brief at 78).

609 Verizon Brief at 69-70.

610 In the Virginia Arbitration, Verizon asked the Bureau, under Issue I9, to cap the prices of certain services provided to Verizon by the competitive LECs at the rates that Verizon charged for comparable services. Verizon argued that permitting the petitioners to set their own rates would be unjust and unreasonable, in violation of Virginia law. *See Virginia Arbitration Order*, 17 FCC Rcd at 27324, para. 587. The Bureau found that, to the extent that it believed that petitioners' rates for those services, which were the subject of tariffs on file with the Virginia Commission, did not comply with Virginia law, Verizon could challenge those rates before the Virginia Commission. *See Virginia Arbitration Order*, 17 FCC Rcd at 27325, para. 589. The Bureau also noted that, with the exception of reciprocal compensation, § 252's pricing provisions establish standards for setting "just and reasonable" rates under § 251(c), which applies exclusively to incumbent LECs. *Id.* at 27324, para. 588. The Bureau found that it would be inconsistent with the Act for it to impose § 251(c) obligations on competitive LECs. *See id.*

611 *See Local Competition First Report and Order*, 11 FCC Rcd at 15612, para. 218 (terms and conditions of interconnection for competitive LEC should be no less favorable than for incumbent). We also reject Cavalier's argument that Verizon should be estopped from raising a jurisdictional defense or deemed to have waived it. *See* Cavalier Brief at 78-79. Cavalier argues that Verizon previously agreed, in the context of a settlement agreement, to compensate Cavalier for parallel winback functions, only to claim after the agreement had been executed that Cavalier does not perform comparable functions. *See id.* at 72, 78-79; *see also* Tr. at 631. Assuming *arguendo* the veracity of this assertion, this is not the proper forum to challenge Verizon's performance of its settlement agreement. Rather, Cavalier should pursue enforcement of it settlement contract with Verizon under the dispute resolution provisions of that agreement. As Verizon argues, it raised its jurisdictional argument throughout its filings (continued....)

c. Truck Rolls

(i) Positions of the Parties

190. According to Cavalier, approximately 11.66 percent of new loop installations[612] by Verizon require a truck roll by Cavalier.[613] These truck rolls occur when Verizon gives inaccurate information to Cavalier, indicating that the new loop is operational although, in fact, the customer lacks dialtone. Cavalier must then perform a truck roll to attempt to isolate the reason for lack of service.[614] Cavalier proposes to assess a nonrecurring Premises Visit Fee of $47.55 for these truck rolls.[615] In some instances, additional truck rolls and "vendor meets" may be necessary. Cavalier also proposes to assess a $47.55 nonrecurring charge for additional truck rolls and a charge of $50 for the first half hour and an additional $16 per quarter hour when Verizon is tardy or does not appear for the scheduled vendor meet.[616] Cavalier sets these "reimbursement" charges at whatever Verizon charges Cavalier for similar services.[617] Cavalier points out that Verizon charges Cavalier for a premises visit when Verizon installs a new loop.[618] Similarly, when it dispatches a technician, Verizon imposes a charge on Cavalier, even if Cavalier arrives late or not at all.[619] Verizon also apparently charges Cavalier for opening a maintenance trouble ticket if a new loop is not working.[620] Verizon's missed appointment charges are listed in the pricing schedule to the Parties' Interconnection Agreement.[621]

(Continued from previous page)
in this proceeding. *See* Verizon Reply Brief at 64. In any case, it is not clear that an estoppel or waiver argument could vest jurisdiction in this Bureau if it did not otherwise exist. *See id.* at 65.

612 Although Cavalier would impose a premises visit for both new loops and hot cuts, *see* Final Proposed Language at 37 (Cavalier Proposed Ex. A(2), Part IV), the witness testified that this problem occurs with new loops rather than hot cuts. *See* Tr. at 647. It is typically a problem with POTS services. Tr. at 631. According to Cavalier's witness, new loop installations constitute approximately 50% of Cavalier's new customer installations. *Id.* at 647. Accordingly, approximately 5.83% of the time when Verizon delivers a loop to Cavalier, Cavalier must initiate a truck roll. *See id.*

613 *See* Tr. at 646-47.

614 Cavalier Brief at 72-74 (citing Cavalier Direct Testimony of Webb at 5, 6, 8 & Exs. AW-1-4; Tr. at 633-34); *see also* Cavalier Reply Brief at 45. Cavalier also notes that no record evidence supports Verizon's Brief "musings" as to why Cavalier might be unable to reach a customer. *Id.* (citing Verizon Brief at 70); *see also* Verizon Reply Brief at 66.

615 *See* Final Proposed Language at 37 (Cavalier Proposed Ex. A(2), Part IV).

616 *See* Cavalier Brief at 74.

617 *See id.* at 74-75 (citing Cavalier Direct Testimony of Clift at 23; Tr. at 616-17).

618 *Id.* at 73 (citing Tr. at 584, 589).

619 *Id.* (citing Tr. at 585-88).

620 *See* Tr. at 635.

621 *Id.* at 587-88.

191. In response to Verizon's argument that it is already subject to performance standards in Virginia that carry substantial monetary penalties for nonperformance under the Virginia PAP, Cavalier argues that the PAP metrics cited by Verizon contain data irrelevant to new loop installations, which mask the new loop installation problem that Cavalier is experiencing, and skew the results in favor of Verizon.[622] Cavalier also asserts that an audit by the New Jersey Commission has confirmed that Verizon's PAP data are inaccurate and unreliable, which is to be expected because Verizon's performance data is self-reported.[623] In any case, Cavalier argues, the PAP was never intended to be a compensation mechanism for an individual competitive LEC but was designed to prevent backsliding after a carrier has been granted authority to provide in-region long distance under section 271.[624] Finally, Cavalier notes that, notwithstanding thousands of Cavalier truck rolls caused by undelivered or otherwise failed new loops, Verizon has never made a single PAP payment to Cavalier based upon loop installation failures and missed appointments.[625] Thus, the PAP utterly fails to compensate Cavalier for its truck rolls.[626]

192. Verizon argues that, even if the Bureau does have jurisdiction to consider Cavalier's proposed charges, it should reject them outright. With respect to truck rolls, Verizon argues that there are many reasons, which are beyond the control of Verizon, why Cavalier might be unable to reach its customer immediately after a loop is installed.[627] Verizon also contends that Cavalier could reduce its truck rolls by participating in Verizon's Cooperative Testing program for digital (or xDSL-capable) loops, which cost the same as analog loops.[628] Verizon states that if cooperative testing shows that the service is not working, Verizon will not charge Cavalier to resolve the problem.[629]

193. Verizon argues that it is subject to performance standards in Virginia under the Virginia PAP, which contains a comprehensive set of performance measurements for timeliness, reliability, and quality of service, as well as self-executing remedies that carry substantial

[622] *See* Cavalier Brief at 80 (citing Cavalier Surrebuttal Testimony of Clift at 2-3).

[623] *See id.* (citing Cavalier Rebuttal Testimony of Clift at Ex. MC-5R).

[624] *Id.* at 79.

[625] *Id.* (citing Cavalier Surrebuttal Testimony of Clift at 3); Cavalier Reply Brief at 45.

[626] Cavalier Brief at 79.

[627] Verizon Brief at 70; Verizon Reply Brief at 66. For example, the customer may not be home when Cavalier calls, the customer may not yet have purchased a telephone or the customer may have decided not to answer the call. Verizon Reply Brief at 66.

[628] Verizon Brief at 70-71 (citing Verizon Answer/Response, Ex. C at Ex. A, Part VI).

[629] *Id.* (citing Verizon Rebuttal Testimony of Albert Panel at 21-22); *see also* Verizon Reply Brief at 66.

monetary penalties for nonperformance.[630] Thus, Verizon claims, Cavalier is wrong in its assertion that Verizon suffers no consequence by failing to deliver dial tone or keep its appointments. Verizon notes that section 26.1 of the proposed Agreement specifically incorporates Verizon's responsibilities under the PAP.[631] Verizon points out that the PAP has been approved by both the Virginia Commission and the FCC in the context of its approval of Verizon's in-region long distance application for Virginia.[632] Although Cavalier claims that the PAP does not cover missed appointments and loops that were not properly delivered, Verizon argues the contrary is true; the PAP was recently modified to hold Verizon financially accountable for the very performance lapses about which Cavalier complains.[633] Verizon points out that Cavalier also can petition the Virginia Commission to change the benchmark measurements set forth in the PAP. Verizon also states that the Virginia PAP contains carrier-specific remedies which should assure carrier-specific performance for Cavalier[634] and claims that the reason that Cavalier has not received payments under the PAP is because Verizon has provided Cavalier with better service than Verizon provides to its own retail customers in Virginia.[635] Moreover, Verizon argues, were the Bureau to adopt special measures and penalties for Cavalier, other competitive LECs would also demand special treatment, whereas the PAP avoids nondiscriminatory treatment of competitive LECs.[636] Although Verizon concedes that the PAP does not provide dollar-for-dollar reimbursement for Cavalier truck rolls, it argues that the Act does not require such dollar-for-dollar reimbursement and that the PAP strikes the right balance by requiring Verizon to pay Cavalier only when it provides Cavalier with worse service than it provides itself.[637]

194. Verizon also argues that Cavalier's proposed truck roll charges, which, in effect, seek "cost-free maintenance," are ill-advised as a policy matter because Verizon should not have to subsidize Cavalier's maintenance costs. Verizon contends that Cavalier's proposal, which contains no limiting language, provides no incentive for Cavalier to reduce its truck rolls; rather, it provides Cavalier with the "perverse incentive" to increase its truck rolls at the expense of

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[630] Verizon Brief at 71; Verizon Reply Brief at 67 (citing Cavalier Brief at 72; *Establishment of a Performance Assurance Plan for Verizon Virginia Inc.*, PUC-2001-00226, Order (Va. Comm'n July 18, 2002) (*Virginia PAP Order*) (additional citations omitted)).

[631] Verizon Brief at 71.

[632] *Id.* (citing *Virginia PAP Order*; *Verizon Virginia Section 271 Order*, 17 FCC Rcd at 21989-90, para. 198); *see also* Verizon Reply Brief at 67 (citations omitted).

[633] Verizon Brief at 71-72 (citing Verizon Rebuttal Testimony of Argo at 6; Verizon Surrebuttal Testimony of Argo at 1); Verizon Reply Brief at 68.

[634] Verizon Brief at 72 (citing Verizon Rebuttal Testimony of Argo at 7).

[635] *Id.* at 73; Verizon Reply Brief at 67-68 (citing Verizon Surrebuttal Testimony of Argo at 2-3).

[636] Verizon Brief at 73.

[637] Verizon Reply Brief at 68-69 (citing *Virginia Arbitration Order*, 17 FCC Rcd at 27382, para. 709; *Carrier to Carrier Guidelines* at 6).

Verizon's rate-payers.[638] Verizon also points out that Cavalier has not submitted any cost studies to support its proposed charges.[639]

(ii) **Discussion**

195. Cavalier has demonstrated that Verizon fails to provide a working loop to Cavalier in more than 11 percent of new loop installations, which we agree is unacceptable.[640] Rather than impose truck roll charges on Verizon, we believe it is more sensible to adopt a variation of the solution proposed by Verizon by requiring it to participate in additional up-front testing at no charge to Cavalier.[641] Verizon states that Cavalier could "reduce its truck rolls by participating in Verizon's Cooperative Testing program for digital (or xDSL-capable) loops."[642] Also, according to Verizon, digital loops cost the same as analog loops.[643] Accordingly, for new loop installations, Verizon may either: (1) develop a cooperative testing program for POTS service, which shall perform the same functions as its cooperative testing program for digital loops, for which it may not charge Cavalier;[644] or (2) provide digital loops and cooperative testing to Cavalier and charge Cavalier no more than it would charge for analog loops. Should Verizon elect the latter alternative, it may not impose additional or different charges for the provision of digital loops than for the provision of analog loops.

(iii) **Arbitrator's Adopted Contract Language**

196. The Arbitrator adopts the following insert to Section 11.14 Cooperative Testing:

> 11.14 Cooperative Testing
>
> 11.14.1 Pursuant to methods and procedures developed as part of the DSL Provisioning Process in New York, at Cavalier's request, Cavalier and Verizon shall perform cooperative testing of DSL-capable Loops. Further, for all Cavalier new loop installations, Verizon shall either (1) provide a

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[638] *Id.* at 69.

[639] Verizon Brief at 70.

[640] *See* Tr. at 647. Although Verizon suggests that many reasons beyond Verizon's control could cause Cavalier to be unable to reach its customer, *see* Verizon Brief at 70; Verizon Reply Brief at 66, we concur with Cavalier that Verizon did not present evidence to support this contention. *See* Cavalier Reply Brief at 45.

[641] Accordingly, we do not address the Parties' debate as to whether the Virginia PAP adequately compensates Cavalier for Verizon's performance lapses.

[642] Verizon Brief at 70-71; Verizon Reply Brief at 66 (citing Verizon Rebuttal Testimony of Albert Panel at 21-22).

[643] Verizon Brief at 70-71; Verizon Reply Brief at 66.

[644] We note that, in the *Virginia Cost Issues Arbitration Order*, we disallowed any charge for cooperative testing. We found there that competitors should not have to pay an additional charge when Verizon does not meet its obligation to provide a functioning loop. *See Virginia Cost Issues Arbitration Order*, 18 FCC Rcd at 17969, para. 632. That reasoning applies here with equal force.

cooperative testing program for analog service that shall perform the same functions as its cooperative testing program for digital loops, or (2) provide digital loops and cooperative testing for all Cavalier new loop installations at the identical recurring and non-recurring rates that apply to its provision of analog loops. If Verizon selects the foregoing option (2), Verizon may not impose additional or different charges for the provision of digital loops than for the provision of analog loops. Verizon may not charge Cavalier for its cooperative testing programs.

197. Insert at beginning of Exhibit A, Part VI. Unbundled Loops:

> Consistent with Section 11.14, Verizon must either (1) provide a cooperative testing program for analog loops or (2) provide digital loops and cooperative testing for all Cavalier new loop installations at the identical recurring and non-recurring rates that apply to its provision of analog loops. If Verizon selects the foregoing option (2), Verizon may not impose additional or different charges for the provision of digital loops than for the provision of analog loops. Verizon may not charge Cavalier for its cooperative testing programs.

d. Winbacks

(i) Positions of the Parties

198. When Verizon delivers a loop to Cavalier in Virginia, it charges Cavalier $13.49 for installing the new loop, which is comprised of a $10.81 Service Order Connect charge and a $2.68 Installation charge.[645] Cavalier argues that when it turns a customer over to Verizon, Verizon should compensate it for performing corresponding and comparable "winback" functions to those for which Verizon charges it under the $13.49 charge. Cavalier bases its proposed winback charge upon Verizon's $13.49 loop installation charge, which, it argues, is a "reasonable and measured proposal."[646]

199. Cavalier argues that when it turns a customer over to Verizon, it performs almost the same services for Verizon as when Verizon turns a customer over to it, but it receives no compensation for these services.[647] Cavalier points out that, under cross-examination, the Verizon witness could not confirm what individual functions were included in the Service Order

[645] Verizon Reply Brief at 70; *see also* Verizon Answer/Response, Ex. C, Ex. A at Part VI, Unbundled Loops, 2-Wire Analog Loops (POTS Loops). We note that there is some discrepancy as to whether Verizon's installation charge is $2.88 or $2.68. $2.68 appears to be the correct number. *See* Verizon Answer/Response, Ex. C, Ex. A at Part VI; Tr. at 617-18.

[646] Cavalier Brief at 77 (citing Cavalier Direct Testimony of Clift at 23: Tr. at 612-13 (additional citations omitted)).

[647] *Id.* at 75.

Connect and Installation charges and was unfamiliar with any cost study that supported her assertion that Verizon would perform these functions free of charge.[648] Cavalier also notes that the Verizon witness did confirm that Cavalier also pays a disconnect charge when a Cavalier customer served via a Verizon-provided loop leaves Cavalier for Verizon.[649]

200. With respect to winbacks, Verizon contends that, when a customer moves from Cavalier to Verizon, Cavalier does not provide Verizon with the facility for the customer's line; instead, this is a Verizon facility.[650] Thus, when Verizon assesses service order processing and installation charges on Cavalier, it is providing Cavalier with a new UNE loop facility.[651] But, Verizon argues, it makes no sense to allow Cavalier to charge Verizon for what the latter characterizes as a "UNE installation charge," which is what Cavalier characterizes a "winback charge."[652] Verizon admits that both Parties perform "virtually the same functions" when either carrier moves a customer to the other.[653] Nevertheless, Verizon denies that it charges Cavalier for any of these functions.[654] Instead, Verizon contends, the $13.49 charge is for installation of a UNE loop, which, it asserts, is a service that Cavalier does not provide to Verizon.[655]

201. Moreover, Verizon argues, the "winback" services for which Cavalier proposes to charge Verizon, such as deleting switch translations, porting a number, and discontinuing customer billing are retail functions properly charged to an end-user.[656] Verizon says it does not charge Cavalier for these retail functions.[657] Verizon claims that Cavalier would have to perform

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[648] *Id.* at 77 (citing Tr. at 642-43).

[649] Verizon charges Cavalier $5.98 for disconnecting the customer. This is made up of a $4.91 Service Order Disconnect charge and a $1.07 Installation Disconnect charge. Verizon Answer/Response, Ex. C, Ex. A at Part VI; *see also* Tr. at 597-98.

[650] Verizon Reply Brief at 70.

[651] Verizon Brief at 74. Verizon explains that the associated nonrecurring charge is intended to cover its one-time costs for provisioning the loop, such as dispatching a technician to rearrange facilities in order to make a loop available to Cavalier's customer, or to cross-connect the loop to Cavalier's collocation arrangement. *Id.*

[652] *See* Verizon Reply Brief at 70.

[653] *Id.* at 70.

[654] *Id.* at 70 (citing Cavalier Brief at 76; Cavalier Direct Testimony of Ferrio at 3).

[655] Verizon Brief at 74-75; Verizon Reply Brief at 70 (citing Cavalier Direct Testimony of Ferrio at 3).

[656] Verizon Reply Brief at 70.

[657] *Id.* at 72. In fact, Verizon denies charging Cavalier for any of the following functions, which Cavalier asserts are performed during a "winback": (1) Initiate Service Order; (2) Provide CSR upon request; (3) Service Order Confirmation; (4) Delete Switch Translations; (5) Install intercept as applicable; (6) Jump wire from Frame to Collo; (7) Update SOA; (8) Coordinate LNP; (9) Test/Trouble Shoot; (9) Expedite. Verizon Brief at 74 (citing Verizon Rebuttal Testimony of Albert Panel at 23).

these functions if its customer switched to a third carrier or discontinued its telephone service altogether.[658]

202. Further, Verizon contends, Cavalier "plucks" the $13.49 charge from Verizon's pricing schedule and attempts to apply it to Verizon but produces no evidence that its costs are the same as Verizon's; Verizon argues that the costs are not the same.[659] Verizon also attacks Cavalier's belated argument that the Verizon disconnect charge is a winback charge.[660] Verizon asserts that the disconnect charge was approved by the Virginia Commission to compensate Verizon for disconnecting a loop; it is not a winback charge.[661] Verizon assesses a disconnect charge whenever Cavalier stops providing service to a customer over a loop, not just when Cavalier returns a customer to Verizon.[662] Since Cavalier does not provide UNE loops to Verizon, it obviously does not disconnect them, so no such charge is appropriate. Moreover, Verizon argues, the $13.49 charge that Cavalier seeks to recover for winbacks is based upon Verizon's charge for installation of a UNE, not its disconnection, so the Bureau should not rely upon the disconnect charge.[663] Finally, Verizon also contends that allowing Cavalier to recover a "winback" charge from Verizon would be unduly discriminatory because no other carrier in Virginia compensates Cavalier for such a processing charge.[664] Accordingly, should Cavalier wish to recover this kind of a charge, it should be contained in a tariff applicable to all similarly situated carriers.

(ii) Discussion

203. We will permit Cavalier to impose a winback charge on Verizon for the tasks it performs when it migrates a customer to Verizon. Cavalier argues that Verizon's $10.81 Service Order Connect and $2.68 Installation charges covered tasks performed by Verizon that correspond to winback functions Cavalier performs for Verizon when a Cavalier customer served by UNE loops migrates to Verizon.[665] In rebuttal, Verizon's witness, who is a Senior Product Manager for xDSL Products and Line Sharing, testified that Verizon "does not charge Cavalier for any of" the activities specified by Cavalier, specifically initiating a service order, provisioning

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[658] Verizon Reply Brief at 70-72.

[659] Verizon Brief at 73.

[660] *Id.* at 75; Verizon Reply Brief at 71 (citing Tr. at 683; Cavalier Brief at 77).

[661] Verizon Brief at 75; Verizon Reply Brief at 71 (citing *Bell Atlantic-Virginia, Inc.*, Case No. PUC970005, Order, Ex Parte: To determine prices Bell Atlantic-Virginia, Inc. is authorized to charge Competitive Local Exchange Carriers in accordance with the Telecommunications Act of 1996 and applicable State law, at 24 (Va. Comm'n Apr. 15, 1999)).

[662] Verizon Brief at 75; Verizon Reply Brief at 71.

[663] *See* Verizon Brief at 75 (citing Cavalier Direct Testimony of Ferrio at 3).

[664] *Id.* at 75-76 (citing Tr. at 636).

[665] *See* Cavalier Direct Testimony of Ferrio at 2-3.

the Customer Service Record (CSR), confirming the service order, deleting switch translations, installing an intercept, installing a jump wire from the frame to the collocation, updating the Service Order Administration (SOA) database, testing/trouble shooting, or expediting a service order.[666] Under cross-examination by Cavalier's counsel and Commission staff, however, the witness admitted that Verizon does perform many of these functions although she was not familiar with all of them.[667] She also admitted that she did not know whether costs associated with particular functions were recovered through the Service Order Connect and Installation charges,[668] or whether some costs "were buried in OSS-type costs or not."[669] Although the Verizon witness testified originally that Verizon did not charge for "winbacks" it became clear under examination that she meant that Verizon does not include a service called "winbacks" in the charges it lists on its proposed Schedule A, rather than meaning that Verizon does not recover the costs of some or all of the services identified by Cavalier under its proposed winback charge.[670]

204. Verizon argues that it is inappropriate to allow Cavalier to impose a winback charge on Verizon because, when Cavalier turns the loop over to Verizon, it does not provide the same functionality as Verizon does when it performs the loop installation provisioning tasks that are the basis for the Service Order Connect and Installation charges. We disagree. The Verizon witness testified that Cavalier is responsible for effecting certain key functions for the benefit of Verizon in the course of transferring customers from Cavalier to Verizon.[671] In particular, when Verizon submits a local service request to Cavalier to move a customer Cavalier serves over a UNE loop to Verizon, Cavalier is required to initiate a loop disconnect with Verizon.[672] That is, Cavalier is required to order and coordinate a date for the customer's loop to be switched from Cavalier to Verizon.[673] Further, Cavalier is required to pay Verizon to effect the switch because, although Verizon performs the actual disconnect task, it is Cavalier's responsibility to arrange for

[666] Verizon Direct Testimony of Albert Panel at 2; Verizon Rebuttal Testimony of Albert Panel at 23 (citing Cavalier Direct Testimony of Ferrio at 3). Verizon's witness also stated that Verizon does not charge Cavalier to update the E911 database or to port the customer's telephone number to Verizon, which are two other activities performed in the winback process. *See* Verizon Direct Testimony of Albert Panel at 30; *see also* Verizon Rebuttal Testimony of Albert Panel at 22.

[667] *See* Tr. at 590-595.

[668] *See id.* at 607-08.

[669] *Id.* at 593-94.

[670] *Compare* Tr. at 640 *with id.* at 592-95, 607-08. We also note that although the Verizon witness originally testified that Verizon does not impose a disconnect charge, she later modified that testimony to indicate that Verizon does impose a charge for disconnection of an unbundled loop. *See id.* at 597-98, 606-07.

[671] Tr. at 640-42.

[672] *Id.* at 596-98, 606-07, 640-42; *see also id.* at 636-37.

[673] *Id.* at 636-39.

the necessary physical work to move the customer from Cavalier to Verizon.[674] Thus, the move from Cavalier to Verizon cannot be conducted unilaterally by Verizon, and, contrary to Verizon's allegations, the work Cavalier performs in connection with the Verizon winback is not solely for the benefit of Cavalier's internal records.[675] In fact, we find that Cavalier's work in connection with a Verizon winback is similar in purpose and scope to the work that Verizon is responsible for performing when Cavalier submits a local service request to Verizon to move a customer from Verizon to Cavalier.

205. In its direct testimony, Cavalier specifically identified the services for which it proposed to charge Verizon as the same or similar to services covered by Verizon's Service Order Connect and Installation charges.[676] To rebut this testimony, Verizon should have produced a witness who was familiar with its cost studies and could testify as to exactly what functions and associated costs are recovered in Verizon's $10.81 Service Order Connect and $2.68 Installation charges. Verizon's witness admitted both that in the loop installation process Verizon performs similar functions to those that Cavalier performs in the winback process, and that the associated costs might be recovered in these charges. Accordingly, the written testimony that Verizon "does not charge Cavalier for any of" the other activities specified by Cavalier[677] can only mean that individual charges for these activities do not appear in the Pricing Schedule, rather than that the charges contained in the schedule do not subsume these activities.[678] Based on the evidence presented, we conclude that Verizon does perform similar functions to those performed by Cavalier in the winback process, and that the associated costs may be recovered in Verizon's $10.81 Service Order Connect and $2.68 Installation charges.[679] In any event, Verizon

674 *Id.* at 640-42. Although Verizon performs the physical disconnect, Cavalier pays Verizon to perform that task. *Id.*

675 *Id.* at 636-42. *Cf.* Verizon Reply Brief at 70-72.

676 *See* Cavalier Direct Testimony of Ferrio at 2-3.

677 *See* Verizon Rebuttal Testimony of Albert Panel at 23.

678 *See* Tr. at 592-95; 607-08. If that is not what the Verizon witness meant by this testimony, her written testimony was inconsistent with her oral testimony. In light of this, we find incredible her assertion that Verizon "does not charge Cavalier for *any* of" the other activities specified by Cavalier, particularly since Verizon admits that both Parties perform virtually the same functions when either carrier moves a customer to the other. *See* Verizon Reply Brief at 70. We also disagree with Verizon that these charges must be the subject of a Cavalier tariff filed with the Virginia Commission. *See* Verizon Brief at 76. In this instance, Cavalier seeks to recover from Verizon for functions for which Verizon charges it. To the extent that Cavalier intends to charge other carriers for similar services, that should be the subject of an agreement between those carriers.

679 We believe that it is reasonable to permit Cavalier to charge Verizon the rate Verizon charges it for the same or similar services. Generally, rates charged by competitors are presumed reasonable as long as they do not exceed the comparable rate charged by the incumbent. *See generally Local Competition First Report and Order*, 11 FCC Rcd 16040-42, paras. 1085-89. To the extent that Cavalier sought to justify a higher rate, we agree with Verizon that a cost study would be appropriate. *See id.* at 16042, para. 1089. Because, however, Cavalier seeks only to charge Verizon what Verizon charges it, we disagree that a cost study is necessary. To the extent that Verizon's charges for comparable services are reduced in the future, Cavalier should also reduce its charges to the same level.

has failed to establish any other method through which the costs are recovered. Accordingly, we allow Cavalier to recover these charges when it migrates a UNE-loop customer to Verizon.

(iii) Arbitrator's Adopted Contract Language

206. The Arbitrator adopts the following language:

IV. UNE-Related Functions Performed by Cavalier

WINBACKS

Winbacks – Service Order
Recurring Charges – N/A
Non Recurring Charges – $10.81

Winbacks – Installation
Recurring Charges – N/A
Non Recurring Charges – $2.68

Total
Recurring – N/A
Non Recurring Charges - $13.49

V. Cavalier Collocation Services

Intrastate collocation –Under the same rates, terms, and conditions as applicable per Verizon – VA SCC Tariff No. 218, as amended from time to time.

VI. Cavalier Operation Support Systems

Under the same rates, terms, and conditions specified in this Exhibit A for analogous Verizon operation support systems functions

VII. All Other Cavalier Services Available to Verizon for Purposes of Effectuating Local Exchange Competition

Available at rates comparable to Verizon charges or at Cavalier's tariffed rates or generally available rates.

IV. ORDERING CLAUSES

207. Accordingly, IT IS ORDERED that, pursuant to Section 252 of the Communications Act of 1934, as amended, and Sections 0.91, 0.291 and 51.807 of the Commission's rules, 47 U.S.C. § 252 and 47 C.F.R. §§ 0.91, 0.291, 51.807, the issues presented for arbitration are determined as set forth in this Order.

208. IT IS FURTHER ORDERED that Cavalier Telephone, LLC and Verizon Virginia, Inc. SHALL INCORPORATE the above determinations into a final interconnection agreement, setting forth both the negotiated and arbitrated terms and conditions, to be filed with the Commission, pursuant to Section 252(e)(1) of the Communications Act of 1934, 47 U.S.C. § 252(e)(1), within 45 days from the date of this Order.

By Order of the Bureau Chief,

William F. Maher, Jr.
Chief, Wireline Competition Bureau